(48)

No. 222

In the Supreme Court of the United States

October Term, 1943.

SENECA COAL AND COKE COMPANY, *Petitioner,*

vs.

MILO LOFTON, *Respondent.*

Reply to Petition for Writ of Certiorari.

HAYES McCOY,
Attorney for Respondent.

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Of Counsel.

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REPLY TO PETITION FOR WRIT OF *CERTIORARI* TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

To the Honorable, The Supreme Court of the United States:

The above named respondent, Milo Lofton, has the honor to reply to the petition of the Seneca Coal and Coke Company for a writ of *certiorari* to the United States Circuit Court of Appeals for the Tenth Circuit and prays this Honorable Court to consider the argument and authorities herein set forth as an answer to said petition.

Statement of the Case.

The petitioner has correctly stated the substance of the evidence and the general issues involved in this case. We have no new propositions of law to submit but expect to rely upon the same authorities presented by the petitioner to uphold the decision of the Circuit Court of Appeals.

It is the respondent's earnest conviction that there is no conflict in the decisions cited by the petitioner; that the

holding and decision of the Circuit Court of Appeals presents no question of federal law which has not been settled by this court; and that the federal questions decided therein were not in conflict with the applicable decisions of this court.

BRIEF AND ARGUMENT IN OPPOSITION TO PETITION FOR WRIT OF *CERTIORARI*.

Answer to Petitioner's Proposition I.

Without quoting the proposition of law upon which petitioner relies as his Specification of Error No. 1, it is the position of the respondent that the authorities cited, quoted and relied upon by the petitioner are conclusive against his contentions in this appeal.

If the theory of the petitioner were correct and sound, the provisions of Section 7 of the Fair Labor Standards Act would be nullified and only minimum wages, established by Section 6, would be regulated by the act. It is elementary to state that the purpose of the enactment of the Fair Labor Standards Act (herein referred to as the act) was to provide maximum hours, as well as minimum wages, for all employees engaged in interstate commerce or in the production of goods for commerce, as defined in said act. The duality of purpose of the Congress is clearly shown by the reports of both the House and the Senate. (See House Rep. 1452, 75th Cong., 1st Sess., pp. 14, 15; 83 Cong. Rec. 9246, 9254.)

The Supreme Court of the United States and several Circuit Courts have held that the object of the act was not

only to raise sub-standard wages but also to require extra pay for overtime work by those covered by the act, even though their hourly wages exceeded the statutory minimum. *Overnight Motor Transportation Company, Inc.*, v. *William H. Missel*, 316 U. S. 572, 62 Sup. Ct. 1216, 86 L. ed. 1159; *L. Metcalfe Walling, etc.*, v. *A. H. Belo Corporation*, 316 U. S. 624, 62 Sup. Ct. 1223, 86 L. ed. 1166; *Mid-Continent Pipe Line Co., et al.*, v. *Hargrave*, (C. C. A. 10) 129 F. (2d) 655; *Bumpus* v. *Continental Baking Co.*, (C. C. A. 6) 124 F. (2d) 549; *Carleton Screw Products Co.* v. *Fleming*, (C. C. A. 8) 126 F. (2d) 537.

Computation of Overtime.

So many courts have passed upon the method of computing the regular rate of pay, in the manner followed by the Tenth Circuit Court in the case at bar, that it appears unnecessary to discuss at greater length the manner in which the overtime rate of pay or the assimilation of straight time and overtime compensation may be made where there was no agreement, express or specific, made between contracting parties concerning the segregation of straight time from overtime payments. Anomalous as it may seem, we contend that the case cited by petitioner (petitioner's brief, pp. 13-14) are authoritative announcements by this court and the Circuit Courts against the theory of the petitioner. We believe that a proper analysis of these decisions was made by the Circuit Court in the instant case, and that this court will follow its previously announced decisions and deny petitioner's application for the writ.

Implication in the Employment Contract.

If compliance with the act can be presumed against the express findings of the court that no expressed intention was made to provide a regular hourly rate or for a division of the agreed salary and the agreed work hours into regular and overtime compensation, it would be difficult to imagine a case where an employer would ever be guilty of violating the act if he paid wages in excess of the statutory minimum wage when a regular rate of pay has been ascertained in the manner done by the petitioner in this case.

In *Overnight Motor Transportation Company, Inc.*, v. *William H. Missel* (hereinafter referred to as the *Missel* case), *supra,* the employees were under a fixed weekly wage, whereas, in this case the respondent was on a monthly salary for regular contract hours. The facts are so analogous to those in the case at bar that we consider the following quotation from the *Missel* case to be particularly appropriate to this discussion:

> "Petitioner invokes the presumption that contracting parties contemplate compliance with law and contends that accordingly there is no warrant for construing the contract as paying the employee only his base pay or 'regular rate,' regardless of hours worked. It is true that the wage paid was sufficiently large to cover both base pay and fifty per cent additional for the hours actually worked over the statutory maximum without violating section six. But there was no contractual limit upon the hours which the petitioner could have required respondent to work for the agreed wage, had he seen fit to do so, and no provision for additional pay in the event the hours worked required minimum compensation greater than the fixed wage. *Implication can-*

not mend a contract so deficient in complying with the law. * * *'' (Italics and asterisks ours.)

In *Warren-Bradshaw Drilling Co.* v. *Hall,* 124 F. (2d) 42, aff. 317 U. S. 88, 87 L. ed. 99 (Adv. Sheet), the plaintiffs were working for a daily wage in contrast to the instant case. The question of implication was given only "slight consideration." This court used the following language:

> "One final contention merits but slight consideration. Respondents were employed on the basis of an eight-hour day and regularly worked seven days a week, receiving fixed wages ranging from $6.50 to $11.00 per day. There was no agreement providing for an hourly rate of pay or that the weekly salary included additional compensation for overtime hours. Petitioner urges that it complied with the overtime compensation requirements of the act because respondents received wages in excess of the statutory minimum wage, including time and one-half of that minimum wage for all overtime hours, which wages respondents impliedly agreed included overtime compensation by accepting them. A similar argument was squarely rejected in *Overnight Motor Co.* v. *Missel,* 316 U. S. 572."

Patsy Oil & Gas Co. v. *Roberts,* 132 F. (2d) 826, decided by the Tenth Circuit January 6, 1943, is squarely in point with our case. Circuit Judge MURRAH rejected the theory of petitioner on the question of implication and stated as follows:

> " * * * we think it is now abundantly clear from the adjudicated decisions that in the absence of a contract or agreement specifying a basic hourly rate of pay, not less than the statutory minimum, and not less than time and one-half that rate for every hour of overtime work beyond the maximum hours fixed by the act, see *Walling* v. *Belo Corporation,* 316 U. S. 624, 634 (5

WHR 453), the basic hourly rate or the regular rate is ascertained by the application of the formula used by the trial court in computing overtime compensation, and this formula applies whether the hours are 'certain or variable.' *Overnight Motor Transportation Company* v. *Missel, supra; Mid-Continent Pipe Line Co.* v. *Hargrave, et al.*, 129 F. (2d) 655; *Warren-Bradshaw Drilling Co.* v. *Hall*, 124 F. (2d) 42, affirmed 87 L. ed. 99.

"It is further contended that the parties contemplated compliance with the act, and to that extent the applicable provisions entered into and became a part of the employment contract, hence the fifty-six hour workweek included the forty-four hour statutory workweek and twelve hours overtime, for which the employee was paid an amount in excess of the statutory minimum wage for the statutory workweek, plus time and one-half that rate for the overtime hours worked beyond the statutory maximum. It is urged that such an agreement meets the statutory requirements.

"It may be conceded that the hours worked in excess of the statutory maximum to be considered as overtime hours, and that the employer intended to compensate the employee therefor at the rate of time and one-half the regular rate. But in the absence of a specific agreement, the regular rate is not the statutory minimum for the purpose of computing overtime compensation. There is no such agreement here and the statute will not supply it. In these circumstances, the regular rate is the wages divided by the hours worked, whether certain or variable. See *Overnight Motor Transportation Company* v. *Missel, supra;* cf. *Walling* v. *Belo Corporation, supra.*"

This same argument was presented and rejected by the Seventh Circuit Court of Appeals on November 25, 1942, in the case of *Walling* v. *Stone*, 131 F. (2d) 461. On page 463 the following language is used by the court:

"It is true that in our case the court found that the defendants and their employees intended that the fixed weekly rates of compensation cover regular and overtime work. *Even so, that alone would not be sufficient to comply with the act; such a general intention may not be transformed by implication into a specific intention that overtime be paid for at time and a half the regular rate, Missel case, supra.* Consequently, the fixed salary contracts here involved did not comply with the provisions of Section 7 of the act. Compare *Warren-Bradshaw Drilling Co.* v. *Hall, et al.*, decided by the Supreme Court, November 9, 1942 (87 L. ed. 99)." (Italics ours.)

It is interesting to note the analysis of the *Missel* case by the writer, Circuit Judge KERNER, in *Walling* v. *Stone, supra.* His opinion states (pages 462-463) as follows:

"In that case, as in the instant case, the contract of employment provided for the payment of a fixed salary regardless of the hours worked. There, as here, during the weeks in question the fixed salary was greater than an amount calculated at the statutory minimum hourly rate (with time and one-half for overtime) for the hours actually worked. Missel brought a statutory action to recover alleged unpaid overtime compensation. The Supreme Court held that the contract did not comply with the requirements of Section 7 of the act and pointed out that two elements are essential in a contract of employment in order to comply with the act: *(1)* either a stated hourly rate for regular work, or an upper limit on the total number of hours to be worked for a fixed salary, and *(2)* an express provision that overtime should be paid for at time and one-half the regular rate. If the first element is absent from a contract, the hours worked might require minimum compensation greater than the fixed wage; if the second is absent, overtime work could be paid for at

> any rate equal to or greater than the ergular rate. Thus, neither of these elements alone is sufficient for compliance with the law—both must be present. In the case at bar both are absent. * * *''

In another case decided by the Seventh Circuit on the same day the *Stone* case, *supra,* was decided, the effect of a wage agreement was considered by the court. It was the case of *Murray* v. *Noblesville Milling Company,* (C. C. A. 7) 5 WHR 949, 131 F. (2d) 470. After stating that the intent of Congress was not only to reinforce employee bargaining power "by prohibiting wage rates below a certain level," but also to reinforce employee bargaining power concerning hours of labor by exerting "financial pressure upon the employer to limit hours to a certain level," the court concludes that the contract in question contravenes the second of those purposes.

The opinion, also written by Circuit Judge KERNER, says, page 473:

> " * * * So far as the employer is concerned, the contract is in practical effect a contract to pay 40 cents an hour for the first 60 hours of work in a week, and 51 cents an hour thereafter. Instead of financial pressure being exerted upon the employer after the statutory maximum number of hours of work, the pressure of increased wages is exerted only after a certain number of hours chosen by the employer himself—60 hours. Because there is no increase of labor cost between the statutory maximum and the hours guaranteed, the employer has a financial inducement to require hours beyond the statutory maximum. Is this the result intended by Congress? Such a contract complies with the provision of Section 7 only in form, and even then only if 'regular rate' is given the definition contended for

by defendant. It is the substance of the contract, rather than its mere form, which should determine whether it complies with the act."

The court's statement concerning the employment contract in the *Murray* case, *supra,* is peculiarly applicable to the instant case. We adopt its statements as part of our argument against petitioner's theory of implication. The court said:

> "To hold that this contract is sufficient under the act is to render wholly ineffective (except in the unusual case in which the stated hourly rate is the statutory minimum) the method adopted by Congress to regulate hours of work. It is to construe the act as though Congress had not enacted a separate section dealing with maximum hours, but had enacted Section 7 as a part of Section 6, intending the time and a half provisions to influence only minimum wages, not maximum hours."

Answer to Petitioner's Proposition II.

It is respondent's contention that a refutation of petitioner's first proposition is also a conclusive answer to this point of law. Petitioner's reasoning appears to be as follows: The employer and the employee, without expressly considering the applicability to their contract, intended generally to comply with the law; they intended generally that the wage paid the employee should be in full for all hours actually worked; therefore, such general intention may be transformed by implication into a specific intention that overtime be paid for at time and one-half the regular rate at which the employee was paid. There are a few

cases which we wish to cite to show the fallacy of the petitioner's argument on that point.

In the case of *Murray* v. *Noblesville Milling Company, supra,* the Circuit Judge of the Seventh Circuit, Judge KERNER, took occasion to discuss a similar contention to that interposed by the petitioner in the case at bar. His statement is particularly apropos here:

> "It has also been argued that the courts must give effect to the intention of the parties with respect to the regular rate of pay. *However, our duty is to give effect to the intention of the parties only in so far as that intention complies with the law.* In many familiar situations the intention of the parties is not permitted to defeat the announced policy of the legislature. Regardless of the intention of the borrower, money may not be loaned at a usurious rate of interest; regardless of the intention of the employee, an employer may not pay him wages less than the applicable minimum wage; regardless of a woman employee's intention, an employer may not require her to work more than the number of hours set by state statute. *The intention of the parties should not be allowed to defeat the obvious intent of Congress in enacting the Fair Labor Standards Act.*" (Italics ours.)

It will be noted from petitioner's brief that the finding of the court to the effect that both parties intended to comply with the law is particularly stressed. This point has also been settled by the Seventh Circuit Court adversely to petitioner's position in the case of *Walling* v. *Stone, supra.* We find the following words from the opinion of Circuit Judge KERNER:

> "It is true that in our case the court found that the defendants and their employees intended that the

fixed weekly rates of compensation cover regular and overtime work. Even so, that alone would not be sufficient to comply with the act; *such a general intention may not be transformed by implication into a specific intention that overtime be paid for at time and a half the regular rate, Missel case, supra.* * * *" (Italics ours.)

We respectfully submit that the case of *Walling* v. *Stone, supra,* is a stronger case on the facts than the instant case, even though the trial court did find that neither party to the contract intended to violate the law. There was no finding or even a general intention that the monthly salary paid respondent should include both straight time and overtime compensation. In fact, the findings of the court (F. 13, 19, 25; R. 68, 70, 72) implied the exact opposite conclusion.

It is important in considering the intention of the parties to this case to note that in the findings of the court there is not a scintilla of evidence that either party ever at any time mentioned the existence of the Fair Labor Standards Act to the other; that there was no discussion whatsoever concerning the number of hours allowed under the maximum work week, provided for in Section 7 thereof; and, even though the respondent had been working for the petitioner approximately twelve years prior to the passage of the act, there was nothing in their course of dealing, conversations or correspondence to indicate whether or not either party gave oral or mental assent, reference or consideration to the terms of the act or had any general or specific intention to conform their contractual liabilities to the specific provisions thereof. It is fundamental that no person

can contract with reference to facts or law concerning which he has no knowledge.

Petitioner's Formula for Computation of Regular Rate of Pay.

Both lower courts had occasion to consider the formula of petitioner (Br., pp. 22-23) by which the regular rate of pay is determined as being sufficient to include straight time and overtime compensation for all hours worked by the respondent. It is not surprising that both the District Court and the Circuit Court of Appeals repudiated the formula, which graphically portrays the fallacy of their argument concerning implication. It is quite obvious that any salary received by the respondent for any hours worked in the workweek could be shown, under petitioner's formula, to comply with the act. It is perfectly obvious that the hourly rate of $0.3791 for straight time compensation and the rate of $0.5686 for overtime compensation per hour are both fictitious rates of pay based upon a presumption antagonistic to the decisions of both courts. Furthermore, the formula is merely a graphic portrayal, in figures, of the fallacy of "begging the question" into which the petitioner has fallen in his entire argument on implication.

In order to demonstrate, conclusively, the *petitio principii of* petitioner's syllogism, let us assume the hypothesis that the respondent worked an extra day of fourteen hours during the workweek to which said formula is made applicable. Under petitioner's formula, the respondent would be paid overtime for only six hours and straight time for eight hours, whereas, his actual compensation should be fourteen hours overtime, or the formula would be required to be

changed for the particular workweek. In that event, the straight time and overtime rate of pay would be another fictitious set of figures to which neither party agreed nor consented.

It is very evident that if the respondent were paid $1,200.00 per year, for example, instead of the salary as found by the court, the hourly rate for forty-four hours statutory weekly straight time, under petitioner"s formula, would be only slightly more than twenty-two cents per hour. Manifestly, this would be below the minimum wage for even the first year from the effective date of the act. We have seen from decisions heretofore cited that such an agreemnt would violate Section 6 of the act even conceding, for purposes of argument, that the overtime provisions were not violated.

This hypothesis clearly demonstrates how unsound is the reasoning of petitioner, as shown by its formula.

If the argument of the petitioner is sound and its formula is valid for the purpose used, there would be no circumstance under which an employer could be held liable for violation of the maximum hour provisions unless and until his regular rate of pay, computed under said formula, fell below the minimum wage provisions of Section 6 of the act; assuming, under the above state of facts, that the agreement was not in accordance with the form of contract approved in the *Belo* case.

Answer to Petitioner's Proposition III.

In considering the point of law raised by petitioner in his third proposition, it is well to remember that the act

does not require an employee to make demand for his overtime compensation or unpaid minimum wage. It is also worthy of note that the petitioner agrees that liquidated damages is mandatory upon the failure of the employer to pay overtime compensation in the event suit is instituted to recover the same. The only issue on this point seems to be whether or not Section 7 was violated when the petitioner failed, refused or neglected to pay the overtime compensation for a period of eighteen months to more than two years after it became due in the regular course of business.

The petitioner apparently relies upon the fact that it did not know that the activities of the respondent were covered by the provisions of the act. It would be absurd to state that there was any mistake on the part of the petitioner or the respondent concerning any material *fact* of the employment relationship or the nature of the duties of the respondent. Manifestly, the only excuse petitioner may have for failure to pay the overtime compensation on the regular pay days, when it became due, was that it was under the apprehension that respondent was not engaged in production of goods for commerce. By all the decisions applicable thereto it would seem that this was a *mistake of law* and not of fact. Can petitioner escape the consequences of its failure to comply with the law on the grounds that it did not know the respondent was entitled to overtime pay? Suppose, for example, suit had been instituted by the respondent when his cause of action was admittedly barred by the state statute of limitations. Is it reasonable to presume that the petitioner would fail to plead the statute as a bar to its claim if it were shown that the respondent did not know of his rights until after the claim was barred by lapse of time? The cases

are too numerous for citation that statutes of limitation are statutes of repose, and claims for money had and received, and the other common law counts related thereto, are prescribed without regard to the knowledge or lack of knowledge of the claimant concerning his rights in the premises.

Payment Within a Reasonable Time.

It will be observed from the court's findings (F. 26, R. 73) that the overtime compensation "was not paid on the regular pay days when it became due and that failure to pay the same prior to the time it was actually paid, as hereinabove found, constituted a violation of the Fair Labor Standards Act * * *." It is the contention of the respondent that this quoted finding was a finding of fact which is conclusive on appeal because it is not mixed with any question of law whatsoever. To hold that liquidated damages is not payable under these circumstances would, in effect, require the employee in every case to demand his overtime compensation whether or not he knew he was entitled to it by the terms of said act.

It will be observed that the court does not conclude, as a matter of law, that the payment of overtime compensation must be made on regular pay days in order to evade liability for liquidated damages. This construction seems to have been placed upon the decision of the lower court in the petitioner's brief. We contend that such a conclusion is unwarranted and wholly foreign to the general purport of both lower courts' decisions.

The employer, in effect, admitted the obligation for overtime compensation when it paid it to the employee, more than eighteen months after part of the work was done.

It will be observed that nearly 85 per cent of the overtime wages paid respondent was paid more than two years after the obligation arose (Finding 23, R. 72). Assuming, for the purpose of argument alone, that "reasonableness of time must be determined by the circumstances of the particular case," would not the court, sitting as a jury in the trying of the facts, be eminently justified in holding that more than two years was an unreasonable time for the employer to delay paying overtime compensation to the employee?

Mistake of Law.

Under the judicial definition of "mistake of law" the petitioner is without excuse for failure to pay overtime compensation and, *a fortiori,* is liable for liquidated damages under Section 16(b) of said act.

Oklahoma courts have defined "mistake of law" as follows:

> "A 'mistake of law' happens when a party, having full knowledge of the facts, comes to an erroneous conclusion as to their legal effect. It is a mistaken opinion or inference arising from an imperfect or incorrect exercise of the judgment upon the facts as they really are."
>
> —*Barnett* v. *Douglas,* 102 Okl. 85, 226 Pac. 1035, 39 A. L. R. 188;
>
> *Palmer* v. *Cully,* 52 Okl. 454, 153 Pac. 154, 158, Ann. Cas. 1918E, 375;
>
> *Cf., Smith* v. *Stevens,* 84 P. (2d) 3, 5;
>
> *Campbell* v. *Newman,* 51 Okl. 121, 151 Pac. 602;
>
> *Watashe* v. *Tiger,* 88 Okl. 77, 211 Pac. 415.

In 12 Am. Jur., Contracts, at Section 140 may be found these words:

"* * * The general rule is commonly said to be that a mistake of law does not effect the validity of a contract where there is no mistake of fact. *Upton* v. *Tribilcock,* 91 U. S. 45, 23 L. ed. 203; *Bank of United States* v. *Daniel,* 12 Pet. (U. S.) 32, 9 L. ed. 989; *Hunt* v. *Rhodes,* 1 Pet. (U. S.) 1, 7 L. ed. 27." (And other cases cited therein.)

In discussing the legal maxim *ignorantia legis neminem excusat,* an early case by this court stated as follows:

"The maxim results from the extreme difficulty of ascertaining what is, bona fide, the interpretation of the party; and the extreme danger of allowing such excuses to be set up for illegal acts, to the detriment of the public."

—*Barlow* v. *United States,* 7 Pet. (U. S.) 404, 411, 8 L. ed. 728.

The decisions are practically unanimous in holding that the payment of liquidated damages is mandatory where employees have brought suit for unpaid overtime compensation, even though the employer settled on the receipts furnished by the Wage and Hour Division.

—*Overnight Motor Transportation Co.* v. *Missel, supra;*

Mid-Continent Pipe Line Co. v. *Hargrave, supra;*

Warren-Bradshaw Drilling Co. v. *Hall, supra;*

Abroe v. *Lindsay Bros. Co.,* (Minn. Sup. Ct.) 300 N. W. 457;

Emerson v. *Mary Lincoln Candies, Inc.,* (N. Y. Sup. Ct.) 20 N. Y. S. (2d) 570, 174 Misc. 353;

St. John v. *Brown,* 38 Fed. Supp. 385;

Williams v. *General Mills,* 39 Fed. Supp. 849;

Muldowney v. *Seaberg Elevator Co.,* 39 Fed. Supp. 275;

Thompson v. *Daugherty,* 40 Fed. Supp. 279;

LeFevers v. *General Export Iron & Metal Co.,* 36 Fed. Supp. 838;

Magann v. *Long's Baggage Transfer Co.,* 39 Fed. Supp. 742;

Robertson v. *Argus Hosiery Mills, Inc.,* (C. C. A. 6) 121 F. (2d) 285, cert. den. U. S. Sup. Ct., 304 U. S. 681.

At least two cases held that liquidated damages are due at the time the straight time wages become due. *Barrineau* v. *Carolina Milling Company,* 5 WHR 921 (U. S. D. C., E. D. of So. Carolina, Oct. 16, 1942); *Shannon* v. *Boh Bros. Construction Company,* (La., 1942) 8 So. (2d) 542, 5 WHR 362; *Cf., Johnson* v. *Phillips Buttorff Mfg. Co.,* (Tenn.) 160 S. W. (2d) 893, cert. den. U. S. Sup. Ct., Oct. 12, 1942, ... U. S. ..., and *Emerson* v. *Mary Lincoln Candies, Inc., supra.*

The courts, moreover, are practically unanimous in holding that the employer's good faith or lack of willfulness or intention to violate the act is immaterial as to liability. *Missel* case, *supra; Emerson* v. *Mary Lincoln Candies, Inc., supra,* and cases cited. The only case we have been able to find that denies liability for liquidated damages where the employer was in good faith in his violation is the case of *Clour* v. *Jones,* 42 Fed. Supp. 700 (E. D. Okla., 1941).

Answer to Petitioner's Proposition IV.

Under this proposition, the petitioner apparently seeks to evade the operation of the act upon the respondent's duties by attempting to show that it was excused from obeying the provisions of this act because of a decision by this court

which had been expressly repudiated by Congress three years after the decision of *James Walter Carter* v. *Carter Coal Company,* 298 U. S. 238, 80 L. ed. 1160.

The petitioner seems to assume that it had a vested right to enter into a contract the obligation of which was impaired by the enactment of the Fair Labor Standards Act.

Petitioner cites the case of *Jackson* v. *Harris,* 43 Fed. Rep. (2d) 513, 516, for the statement that "where contracts have been entered into or rights acquired upon the faith of a decision, they cannot be impaired by a change of construction made by a subsequent decision."

Crigler v. *Shepler,* 79 Kan. 834, 101 Pac. 619, 23 L. R. A. (NS) 500, holds that "a person who is not a party or privy in the action cannot acquire a vested right in an erroneous decision made therein."

In *Haskett* v. *Maxey,* 134 Ind. 182, 33 N. E. 358, 19 L. R. A. 379, the following rule of law is announced:

> "The decisions of a court of last resort, the authorities assert, are not the law, but are only the evidence or exposition of what the court construes the law to be, and in overruling a former decision by a subsequent one the court does not declare the one overruled to be bad law, but that it never was the law, and the court was therefore simply mistaken in regard to the law in its former decision. The first decision, upon the point on which it is overruled, is wholly obliterated, and the law as therein construed or declared must be considered as though it never existed, and that the law has always been as expounded by the last decision."

It is quite apparent that the petitioner is making its argument upon a fact situation entirely different than the

one present before this court. In every instance where the doctrine of *stare decisis* has been relied upon as a defense, the subsequent decision of the court of last resort has changed its decision upon the identical statute construed in the original opinion. In this case, however, subsequent to the decision in the *Carter Coal Company* case, *supra,* Congress enacted the Fair Labor Standards Act. This fact alone removes this case from the general circumstances under which *stare decisis* is employed.

Furthermore, there is no contention by the petitioner, and neither could it be successfully interposed by anyone, that the Fair Labor Standards Act attempts to be retroactive in its operation. Therefore, it is apparent that whatever rights have been vested by the decision in the *Carter Coal Co.* case can no longer be claimed subsequent to October 24, 1938, the date said act became effective. Subsequent to the aforesaid date, the petitioner had no right to presume or rely upon the decision of this court in the *Carter Coal Company* case.

In 16 C. J. S., Const. Law, Section 275, we find this interesting and appropriate discussion of the law applicable to the fact situation before this court:

> "The Law Impairing the Obligation. Sec. 280. *Judicial Decisions.* Constitutional prohibitions against impairing the obligation of contracts apply only to legislative and not to judicial action.
>
> "Although a number of cases, induced by a *dictum* in an early U. S. Supreme Court opinion, *(Ohio L. Ins., etc., Co.* v. *Debolt, Ohio,* 16 How. 416, 14 L. ed. 907) have held in general terms, that constitutional prohibitions against 'impairing the obligation of contracts'

are violated by a judicial decision which overrules previous decisions and thereby impairs the obligation of a contract under the law as construed when it was made, it is now definitely and authoritatively settled that such prohibitions in federal and state constitutions relate to legislative action and not to judicial decisons * * *. Nor does a mere change in judicial decisions come within such prohibition, even though it invalidates a contract previously sustained or impairs the validity of a contract made in reliance on prior decisions. *McCray* v. *Miller,* 186 Pac. 1087, 78 Okl. 16, denying rehearing 184 Pac. 781, 78 Okl. 16. See *Tidal Oil Company* v. *Flanagan,* 44 Sup. Ct. 197, 263 U. S. 444, 68 L. ed. 382, dismissing error 209 Pac. 729, 87 Okl. 231; *Storrie* v. *Cortes,* 90 Tex. 283, 38 S. W. 154, 35 L. R. A. 666; 12 Am. Jur., Sec. 398, p. 26. Annotation: 85 A. L. R. 262."

In 11 Am. Jur., Const. Law, Section 151, page 832, on the subject of Validation of Unconstitutional Statute, these words may be found:

"While it has been broadly stated that an unconstitutional act cannot be validated by the legislature, it seems that it may be amended into a constitutional one so far as its future operation is concerned by removing its objectionable provisions, or supplying others, to conform it to the requirements of the Constitution. The distinction seems to be that where a statute is invalid by reason of an absence of power in the legislature in the first instance under the Constitution to enact the law, it is not possible for that body to confirm or render the same valid by amendment; but where the obnoxious features of the statute may be removed or essential ones supplied by a proper amendment, so that had the law been primarily thus framed it would have been free from the objections existing against it, then the statute may be rendered valid by amendment, so far as its future operation may extend."

It is elementary that every regularly enacted legislative act will be presumed to be valid and constitutional until it has otherwise been declared by a competent tribunal. (See 16 C. J. S., Const. Law, Sec. 99, p. 250 and cases cited therein; 11 Am. Jur., Const. Law, Sec. 128 and cases cited.)

The petitioner seems to take the position that the doctrine of *stare decisis* would be applicable as a defense against liability for liquidated damages but not against unpaid overtime compensation. In view of the holding of this court, and many inferior courts, to the effect that liquidated damages is mandatory under Section 16(b) of the act, it seems logical to infer that the petitioner is calling upon the equitable powers of this court to relieve it from an alleged hardship which it created in its failure to pay the respondent according to the mandated provisions of said act. We feel sure that this court will not give consideration to this irregular method of petitioner in reaching its objective sought.

Conclusion.

We respectfully submit that the writ of *certiorari* should be denied.

Respectfully submitted,

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